IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 131

ACCELERATED TRANSPORT-PONY EXPRESS, INC., ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

On Appeal From the United States District Court for the District of Vermont

SUPPLEMENT TO OPPOSITION TO MOTIONS TO AFFIRM

The purpose of this Supplement is to bring to the attention of the Court the Petition for Suspension filed with Appellee Interstate Commerce Commission by Kingsport [Tennessee] Chamber of Commerce, Inc. on or about August 28, 1964 and reproduced as Appendix hereto.

After the District Court vacated its stay of the Commission's decision the Commission ordered compliance with it on or before June 26, 1964. The carriers' method of compliance was based on the premise that, despite the Commission's formal finding that the intra-

territorial rates in issue were unjust and unreasonable to the extent that they exceeded interterritorial rates, it was actually condemning only what it considered a discriminatory relationship between the former and the latter. The carriers therefore determined to both reduce the intraterritorial rates and increase the interterritorial rates, rather than to reduce the former to the level of the latter. Accordingly, new tariffs were filed by Middle Atlantic Conference, Eastern Central Motor Carriers Association and Southern Motor Carriers Rate Conference.

Those tariffs re-group points south and west of the borders of Middle Atlantic Territory and fix the interterritorial rates at the re-grouped points as maximum intraterritorial rates at intermediate points north and east of the borders. The Petition of Kingsport, protesting the re-grouping in the tariffs of the Southern Conference, illustrates what was done. To remove the disparity between intraterritorial rates at Bristol, Virginia-Tennessee and interterritorial rates at Kingsport, Tennessee, the interterritorial rates at Asheville, North Carolina were made applicable at Kingsport, Tennessee and fixed as maxima at Bristol. As Kingsport points out, the effect is to increase interterritorial rates at Kingsport and deprive it of "its natural geographic advantage" over Asheville, i.e., the advantage of being 84 short highway miles and 134 rate making miles closer to "the major marketing areas in Middle Atlantic territory." (App., pp. 3a, 4a).

The Commission approved this method of compliance with its decision by denying petitions of intervening Appellees here to reject the tariffs of Middle Atlantic Conference and Eastern Central Motor Carriers Asso-

ciation for failure to comply therewith.[1] They took effect June 26, 1964. Those of Southern Motor Carriers Rate Conference are filed to take effect September 21, 1964. This action of the Commission lays bare its error in this case, for it makes crystal clear that it itself recognizes that its finding that the increased intraterritorial rates are unjust and unreasonable is unsupportable. Obviously, if the intraterritorial rates are unreasonably high to the extent that they exceed the interterritorial rates, as the Commission found, the former are not made reasonable by increases in the latter. Yet the Commission has treated increases in interterritorial rates as compliance with its order requiring the establishment of reasonable intraterritorial rates.

We submit that there can be no doubt that what the Commission has attempted is nothing more nor less than to eradicate discrimination without first determining whether the discrimination is unlawful. Moreover, it is eradicating disparities between intraterritorial and interterritorial rates by creating disparities between interterritorial rates. For example, as Kingsport shows, the interterritorial rate between Philadelphia and Kingsport will be higher than the interterritorial rate between Philadelphia and Rogersville, Tennessee, a point 30 miles further south (App., p. 6a).

Kingsport points out that "interterritorial rates were not before the Commission and no consideration was given to cost or a Traffic study between the terri-

[1] The Commission also denied a petition for an order specifically finding that the tariffs of Middle Atlantic Conference were in compliance with its decision. However, since the tariffs depart from the requirements of its regulations under Section 217(a) of the Act governing the "form and manner" of publication, it was necessary that it grant and it did grant special permission to file them.

tories" (App., p. 8a). It also says that "*if* proper cost and traffic studies indicate changes are to be required to solve the border problem, such changes could and should be made in such manner as not to destroy basing point relationships of long standing, natural geographic advantages, et cetera." (App., p. 7a; Emphasis original). We agree. As we said in our Jurisdictional Statement and Opposition To Motions To Affirm, the Commission, having found Appellants' rates just and reasonable in their level and *inter sese*, cannot order them cancelled because of their relationship to other rates without an investigation of both sets of rates and a finding of unlawful preference, prejudice or discrimination. *State of New York* v. *United States*, 331 U.S. 284 (1947); *United States* v. *Chicago, M. St. P. R. Co.*, 294 U.S. 499 (1935).[2] These cases make clear that the Commission cannot *say* that rates fail to meet one criterion for lawfulness in order to avoid *finding* whether or not they fail to meet another.

Respectfully,

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September 16, 1964

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[2] Compare *Seatrain Lines, Inc., et al.* v. *U.S.A. and I.C.C., et al.*, Civil No. 33-62 in the United States District Court for the District of New Jersey, decided September 1, 1964. The three judge court held that the rail rates in issue there *were not* destructively competitive in violation of the National Transportation Policy but *were* unjustly discriminatory in violation of Section 3(4) of the Act.

APPENDIX

BEFORE THE INTERSTATE COMMERCE COMMISSION

EFFECTIVE DATE: September 21, 1964

TARIFF REFERENCE: Southern Motors Carriers Rate Conference, Agent, Supplement 9 (Note 163) to Tariff 500-F, ME-ICC 1286

COMMODITY: LTL Class Rates
Applicable on LTL or Any Quantity Shipments
Weighing Less than 6,000 Pounds

TERRITORY: Between Middle Atlantic Territory and Points In Southern Territory Immediately South of Middle Atlantic Territory

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Comes now the Kingsport Chamber of Commerce, Inc., and respectfully petitions the Commission to suspend the schedules described herein for the following reasons.

I

The Kingsport Chamber of Commerce, Inc., is a corporation organized under the laws of the State of Tennessee with offices at 226 Commerce Street, Kingsport, Tennessee. Through appropriate action taken by its Board of Directors, it has authorized the Transportation and Utility Council to file this protest against the proposed increase in rates and to seek an investigation by the Commission.

Your Protestant has a membership of 461 businesses, manufacturing firms, and individuals. The membership receives and ships a large volume of LTL freight by com-

mon carrier motor truck in interstate commerce to and from Kingsport and other territories, including Middle Atlantic territory.

II

The publication here protested proposes to eliminate Kingsport as a basing point on LTL or any quantity shipments weighing less than 6,000 pounds on traffic between this border area and Middle Atlantic territory. Kingsport is assigned to Asheville, North Carolina, as a basing point. The rate making distance between Kingsport and Asheville is 134 miles. This proposal, we believe, would produce the largest rate making group in history. The distance between the extreme points in the group would exceed 125 miles short line distance or 160 miles on rate making route. Such grouping, if allowed to become effective, would produce rates both prejudicial and otherwise discriminatory against Kingsport and its immediate area and would be clearly in violation of the National Transportation Policy, Section 216 (d) of the Act.

In reviewing the tariffs, we find that there is no similarity between the tariffs published by the different territorial agents. Middle Atlantic territory tariff MF-ICC A-1415 provides a weight break on LTL shipments of 2,000 pounds and 6,000 pounds, while SMCRC Tariff 504-B, MF-ICC 1282 provides a weight break of 500 pounds. The protested proposal attempts to apply the Asheville group on shipments weighing less than 6,000 pounds from and to the border points. We can find no place in SMCRC Tariff MF-ICC 1282 where there is any change made in the break-down rates of 500 pounds. One must refer to the Group Guide to come up with any break-down different from the original tariff. Since Kingsport is shown in the class tariff proper, much confusion will result from this publication.

One example will suffice. A shipment is made from Kingsport to a destination in Middle Atlantic territory

weighing 5,000 pounds. In order to determine the correct rate, one would first find it necessary to check the rate from Kingsport to the same destination on 6,000 pounds and then go to the Group Guide and find that Kingsport takes Asheville, North Carolina, basis on shipments weighing less than 6,000 pounds. There he would use his normal break-down based on 500 pounds from Asheville. This results in nothing less than a chaotic rate situation and confusion.

The proposed method of rate making runs against LTL class rates under 6,000 pounds only. However, history dictates to us that if the method of increasing rates through confusion and without justification that we may expect very soon that the Commodity, Commodity Column, and Exception rates will follow.

The National Transportation Policy is specific in condemning preference and prejudice as set out in the following language:

Section 216 (d) of the Act—

> "It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; *or to subject any particular person, port, gateway, locality, region, district, territory or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.*" (Emphasis supplied)

There can be no question but that Kingsport, Tennessee, would under the publication here protested, be robbed of its natural geographical advantage over the Asheville, North Carolina, area with respect to rates between these two areas on the one hand and points in Eastern territory on the other. Kingsport is an industrial city located only

twenty miles south of Bristol. One of Kingsport's most effective tools in its aggressive search for new industries has been its location in relation to the major marketing areas in Middle Atlantic territory. Should the herein protested rates become effective, Kingsport would have its present inherent geographic advantage destroyed.

The current rate basis numbers (Docket 28300 rail rate making miles), as published in SMCRC Tariff 504-B (Eastern-Southern Class), MF-ICC 1282, between Kingsport and Asheville on the one hand and a few representative Eastern basing points are as follows:

Asheville to	Rate Basis No.	Kingsport to	Rate Basis No.
Baltimore, Md.	520	Baltimore, Md.	467
Boston, Mass.	928	Boston, Mass.	875
Buffalo, N. Y.	803	Buffalo, N. Y.	669
New York, N. Y.	701	New York, N. Y.	648
Philadelphia, Pa.	608	Philadelphia, Pa.	555
Providence, R. I.	901	Providence, R. I.	848
Stamford, Conn.	749	Stamford, Conn.	696
Washington, D. C.	472	Washington, D. C.	418

The protested publication would make Kingsport subject to Asheville, North Carolina, as a rate basing point.

Between all other points in Southern territory, outside the scope of the protested publication, and points in Eastern territory, carriers party to Southern Motor Carriers Rate Conference Tariff 504-B, MF-ICC 1282 observe Docket 28300 grouping and rate basis numbers (rail rate making miles). Yet, they here propose to arbitrarily disregard Docket 28300 grouping—and thereby increase rates—between Kingsport and Eastern points by amounts ranging from 46 miles with respect to Washington, D. C. to 134 miles with respect to Buffalo, New York. There may

be even greater increases than 134 if one checked all possible areas of discrimination.

This arbitrary and unreasonable increase of rate basis numbers between Kingsport and Eastern points will cause the Class 100 rates on shipments weighing each less than 500 pounds to increase as follows:

Between: Kingsport		*Rates in Cents Per Cwt.*	
		Present	*Proposed*
And:	Baltimore, Md.	377	392
	Boston, Mass.	522	545
	Buffalo, N. Y.	453	507
	New York, N. Y.	445	468
	Philadelphia, Pa.	406	429
	Providence, R. I.	513	537
	Stamford, Conn.	459	483
	Washington, D. C.	354	377

SMCRC MF-ICC 1282

The carriers are apparently working under what we believe to be an erroneous interpretation of the Commission's order in the Middle Atlantic and New England Rate Case, Docket No. 33652. Here the Commission permitted the carriers to increase rates, giving at least tacit approval, except where the rates to intermediate points exceeded rates to the more distant points. The carriers are interpreting the order to mean that they must adjust the inter-territorial rates south of the border.

In Docket 33652, the Commission in its discussion points out very specifically that the inter-territorial rates are not in issue. In the discussion, the Commission says:

> "A number of instances are shown where the proposed rates are higher to border points within the affected area which are intermediate over the same routes to points outside the area to which lower rates apply. The respondents claim that they are powerless to correct such situations, and suggest that the rates to and from the border points be required as minimum

rates to and from the more distant points. Inter-territorial rates are not here in issue."

And further:

"With respect to resulting higher rates to border points than to points beyond over the same routes, obviously, in accord with prior decisions of the Commission, such higher rates would be unlawful, and we concur in the conclusion of the examiner in this respect that if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points. To the extent that such maladjustments occur, the increased rates are unjust and unreasonable."

Protestant recognizes that there are rates within Middle Atlantic territory that are higher at the intermediate border points than to more distant points south of the border.

Nevertheless, if the Commission elects to observe the long and short haul principle with respect to Middle Atlantic and East-South rates, the rates sought to be established under the publication here protested will have to be condemned because, in effect, they only move the "border" which now exists at Bristol, Virginia-Tennessee, southward into Southern territory. Almost countless instances of identical in principle examples could be given, but for the sake of brevity consider the relationship of rates between Kingsport and Rogersville to Philadelphia, Pennsylvania. Rogersville, Tennessee is approximately thirty miles greater distance than Kingsport from Philadelphia. Shown below are the present and proposed Class 100 rates on shipments weighing less than 500 pounds between Kingsport and Rogersville on the one hand and Philadelphia, Pennsylvania on the other:

		Present		Proposed	
Between:	Philadelphia	Rate Basis No.	Rate	Rate Basis No.	Rate
And:	Kingsport	555	406	608	429
	Rogersville	566	406	(no change)	406

A "solution" which simply moves a problem a few miles down the road is not a true solution and should be condemned.

IV

Protestant understands why drastic reduction of Middle Atlantic rates from and to points on the border of Southern territory would be just as objectionable and distasteful to the carriers as drastic increase in East-South rates from and to Southern points just below the Middle Atlantic border is to the shippers in the area just South of the border. The carriers would have us believe that they cannot afford drastic reduction in those rates from and to a substantial portion of Middle Atlantic territory just because they exceed rates at more distant points.

Protestant is sympathetic with this position of the carriers, both from the standpoint of recognizing their desire and need for a profit, and from the standpoint of wanting and needing undiminished service from the carriers. Protestant recognizes that its members cannot reasonably expect to continue to receive good motor carrier service if the carriers are forced to maintain rates and charges at a level below a just and reasonable rate.

V

The correct answer must lie somewhere between the extremes of the Middle Atlantic rates which the Commission ordered adjusted at the border and the East-South rates which produce lower charges at more distant points, and, *if* proper cost and traffic studies indicate changes are to be required to solve the border problem, such changes could and should be made in such manner as not to destroy basing point relationships of long standing, natural geographical advantages, et cetera.

Protestant understands that the carriers have already undertaken cost and traffic studies looking toward the end

of "melding" of Middle Atlantic and East-South rates in an orderly fashion. This protested schedule should be suspended to permit the traffic study to be completed as a basis on which remunerative rates may be lawfully made.

VI

In summary:

1—The carriers seem to have been stampeded into a hasty and ill conceived method of trying to comply with an order of the Commission to change a rate situation which Protestant believes to be unlawful.

2—The hasty method of compliance is unusual and unlawful because the inter-territorial rates were not before the Commission and no consideration was given to cost or a Traffic study between the territories.

3—The carriers have made an honest effort to establish rates within the Middle Atlantic territory in compliance with the Commission's order in general increase—Middle Atlantic and New England territory Docket 33652. (MF-ICC A-1415 and others effective June 26, 1964).

Protestant would urge that the Commission consider the June 26 rates to be in substantial compliance with its order, and that the inter-territorial rates here protested be suspended to permit due process of rate making.

4—If the Commission insists that the border problem be treated, the best interests of both shippers and carriers lie in doing so in a carefully studied and orderly manner which won't be prejudicial to the parties involved.

5—The carriers have advised us they have already authorized cost and traffic studies looking toward a melding of Middle Atlantic and East-South rate struc-

tures to remove the border "hump" in a non-prejudicial manner.

WHEREFORE, Protestant prays that the Commission will suspend the protested schedules and shall enter into a proceedings of investigation to determine the lawfulness of said rates at which proceedings the Protestant will appear if afforded an opportunity to do so, and produce evidence in support of his allegations.

Respectfully submitted,

KINGSPORT CHAMBER OF COMMERCE, INC.

W. E. NEWELL, *President*

TRANSPORTATION AND UTILITIES COUNCIL OF THE KINGSPORT CHAMBER OF COMMERCE, INC.

B. O. RIPLEY, *Chairman*

H. D. MUSICK, *Registered Practitioner before the Interstate Commerce Commission*

226 Commerce Street
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Date: August 28, 1964